

Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons Sdn Bhd & Ors

HIGH COURT (KOTA BHARU) – CIVIL SUIT NO 23-69-86
IDRIS YUSOFF J
30 JUNE 1988

Contract – Guarantee – Interpretation of guarantee – Whether guarantee applies to credit facilities extended prior to signing of guarantee – Rules of the High Court 1980, O 14 – Contracts Act 1950, s 2(d)

Civil Procedure – Application for summary judgment – Construction of guarantee – Court should decide on true construction – Rules of the High Court 1980, O 14

Words and Phrases – ‘Guarantee’

In this case the plaintiff claimed against the first and second defendants the sum of \$458,749.84 and \$193,064.77 respectively, being the balance of the price of goods sold and delivered to them. The claim against the third to sixth defendants was as guarantors by virtue of a guarantee in which they undertook, inter alia, to jointly and severally pay the plaintiff all the moneys due from the first and second defendants up to a maximum sum of \$200,000. The plaintiff applied to sign final judgment (a) against the first defendant for the sum of \$458,749.84 together with interest at the rate of 8% from the date of filing to the date of realization, (b) against the third to sixth defendants jointly and severally for the sum of \$200,000 together with interest at the rate of 8% from the date of filing to the date of realization. The senior assistant registrar allowed final judgment for the sum of \$458,749.84 to be entered against the first defendant with interest as prayed but as against the third to sixth defendants for the sum of \$26,811.27 only and unconditional leave to defend the claim for the balance sum. The plaintiff appealed in respect of that part of the judgment in which the senior assistant registrar gave unconditional leave to defend. It was common ground that after the signing of the guarantee the first defendant incurred a debt of \$26,811.27 only.

Held, allowing the appeal:

On going through the guarantee in this case the court was of the view that it was within the contemplation of the parties that the guarantors were to be saddled with the liabilities not only after but also before the signing of the guarantee.

Cases referred to

- 1 *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168 (folld)
- 2 *Chew Soon Tat v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 (distsd)

Legislation referred to

Contracts Act 1950 s 2(d)
Rules of the High Court 1980 O 14

Mohamed Nasrim bin Datuk Mohd Salleh for the plaintiff.
Lim Hong Sang for the defendants.

Cur Adv Vult

Idris Yusoff J: The plaintiff in this suit filed an action against the first and second defendants claiming for \$458,749.84 and \$193,064.77 respectively, being the ba-

lance of the price of goods sold and delivered to them. The claim against the third to sixth defendants was as guarantors by virtue of them being the signatories to the guarantee dated 1 March 1984 in which they undertook, inter alia, to jointly and severally pay the plaintiff all moneys due from the first and second defendants up to a maximum sum of \$200,000.

By a summons-in-chambers the plaintiff applied to sign final judgment pursuant to O 14 of the Rules of the High Court 1980:

- (a) against the first defendant for the sum of \$458,749.84 together with interest at the rate of 8% from the date of filing to the date of realization;
- (b) against the third, fourth, fifth and sixth defendants jointly and severally for the sum of \$200,000 together with interest at the rate of 8% from the date of filing to the date of realization; and
- (c) costs.

The summons came before the senior assistant registrar who after hearing submissions from both sides allowed final judgment for the sum of \$458,749.84 to be entered against the first defendant with interest as prayed for but as against the third, fourth, fifth and sixth defendants for the sum of \$26,811.27 only and unconditional leave was given to the said defendants to defend the claim for the balance sum. Costs were also awarded to the plaintiff.

The appeal by the plaintiff is in respect of that part of the judgment in which the senior assistant registrar gave unconditional leave to defend.

In coming to that decision the senior assistant registrar was satisfied that the third to sixth defendants had raised the following triable issues and I quote:

- (i) whether they were liable for the sum owed by the first defendant before they became the guarantors;
- (ii) what was their intention when they signed the guarantee.

It is, however, common ground that after signing the guarantee the first defendant incurred a debt of \$26,811.27 only.

Before me, counsel for the plaintiff submits that the matter revolves around the question of interpretation of the instrument of guarantee. He refers firstly to the recital which indicates that the guarantors, ie the third to sixth defendants, are aware of the existence of the purchase agreement between the plaintiff on the one part and the first and second defendants on the other which agreement confers credit facilities under the normal credit period on the first and second defendants. It is submitted that in view of this agreement the guarantors would have been aware at the time of signing the guarantee that the first and second defendants must have debit balances in their accounts with the plaintiff. In terms of the element

of consideration, counsel refers to cl 2 of the guarantee which says:

... and in consideration of CBMB (plaintiff) having at the request of the guarantors agreed to provide such credit facilities to the borrower the guarantors hereby jointly ...

and this clause constitutes consideration within the ambit of s 2(d) of the Contracts Act 1950. He goes further to say that the combined effect of cll 1 and 2 of the guarantee connotes that the guarantors have agreed to jointly and severally undertake to guarantee as principal debtors and not merely as sureties to repay the plaintiff whatever credit facilities that have been extended to the first and second defendants but to a maximum of \$200,000 by virtue of cl 3 and the facilities include those extended prior to the signing of the guarantee. Since both parties agree that the crux of the matter involves solely the question of construction of the guarantee and no further factual evidence is required, counsel submits that following the judgment of Raja Azlan Shah J (as he then was) in *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd*¹ which says:

... If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

the court should grant the application for summary judgment under O 14 if it places a construction in favour of the plaintiff.

Mr Lim Hong Sang for the defendants, however, argues that the recital does not state the outstanding amount of the debt and reliance is placed on the case of *Chew Soon Tat v Malaysia National Insurance Sdn Bhd*² as an authority that the guarantor would only be liable for debts or liabilities incurred after the date of the guarantee.

The term 'guarantee' means an accessory contract whereby one party (the guarantor or surety) undertakes to be answerable for the debt, default or miscarriage of another (principal debtor) who is primarily liable to a third party (the creditor). It is thus a contingent liability but there have been cases whereby the liability of the guarantor had been made primary and co-extensive with the principal debtor, depending upon the intention of the parties which is to be collected from the language and the words of the guarantee. It is immaterial, in the legal construction of the guarantee, that the party signing it knew nothing of the circumstances or the dealings between the debtor and the creditor, because generally a person signing such an instrument must be taken to have intended that which the words themselves naturally import, with reference to the circumstances that exist,

whether he has taken care to make himself acquainted with the circumstances or not.

In the case under appeal it is the document of guarantee and this document alone which is the foundation of the claim by the plaintiff and in the circumstances it seems that the rights and liabilities of the parties depend upon the true construction of the guarantee and indeed this view is not disputed by either side.

Reading the recital of the guarantee it is clear that the guarantors had knowledge of the arrangement regarding credit facilities extended to the first and second defendants though the amount was not ascertained. In that event I do not think that the guarantors can be allowed to controvert this statement since the statement appears to have generally been agreed upon by all the parties. On reference to cl 1 the term 'the said moneys' plays a very significant role in construing the guarantee. In the context it means a sum as recorded in the books of CBMB (Calsberg Brewery Malaysian Bhd) as representing the credit given to the first and second defendants for goods supplied by the plaintiff and it is in respect of 'the said moneys' that the guarantors agree to guarantee repayment upon the terms and conditions appearing in the guarantee. As cl 1 stands it imposes an obligation on the guarantors to make good all sums constituting 'the said moneys'; however, their liabilities are restricted by cl 3 which imposes a maximum limit of \$200,000. The 'said moneys' as at the date of filing the claim, at least stood at \$458,749.84, being the final judgment awarded against the first defendant by the senior assistant registrar and there is no appeal against the said order.

Adverting to the defendants' contention, it appears to me at least prima facie that such contention bears some merits but the underlying principle therein is not without any exception for, as I have said earlier, the extent of the guarantors' liabilities will normally be spelt out in the guarantee in clear and unambiguous terms so that the intention of the parties can be gathered therefrom.

Chew Soon Tat's case,² relied upon by the defendants to my mind cannot be taken as a proposition that the guarantor is only liable for debts or liabilities incurred after the date of the guarantee. The decision in that case was arrived at based on the facts as presented therein and also having regard to the loosely worded letter of guarantee. The court found that 'there was no expression of intention nor can we be justified in holding that the appellant accepted and/or undertook liabilities prior to 3 April 1972', ie the date of the letter of guarantee. On the strength of the guarantee the court was not in favour to make the guarantor liable to contribute towards repayment of liabilities incurred before 3 April 1972 'in the absence of express acceptance or undertaking of liability therefor'. The decision implies that the guarantor can be

made liable for any antecedent debt if the guarantee so expressed.

On going through the guarantee in this present appeal I am of the view that it is within the contemplation of the parties that the guarantors are to be saddled with the liabilities incurred not only after but also before the signing of the guarantee. This is the plain meaning of the words used, and an appreciation of this plain meaning inevitably destroys the contention of the guarantors advanced in this appeal.

In consequence thereof I allow the appeal and make an order in terms of the prayer as in para 1(a)(ii) of the summons-in-chambers. Costs to the plaintiff.

Appeal allowed.

Solicitors: *Yip Yeo & Nasrim; HS Lim, Teo & Partners.*

Reported by *Prof Ahmad Ibrahim*

Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor

HIGH COURT (ALOR SETAR) – ORIGINATING MOTION
NO 32-09-1987
MOHAMED ARIFF J
12 SEPTEMBER 1987 AND 9 JUNE 1988

Administrative Law – Application for mandamus – Application to register Muslim marriage solemnized in Thailand – Whether High Court has jurisdiction – Duty of Kadi not a purely ministerial act requiring no judgment or discretion on his part – Case still pending in Kadi's court – Existence of alternative remedy – Female party to marriage subsequently obtaining a divorce and marrying another person – Original foreign marriage ceased to be in existence – Rules of the High Court 1980, O 53 – Specific Relief Act 1950, ss 44 & 45

Islamic Law – Application to register Muslim marriage solemnized in Thailand – Exercise of discretion and judgment by Kadi – Case still pending – Application for mandamus refused – Islamic Family Law Enactment 1984 (Kedah), ss 23, 25 & 108 – Federal Constitution, Ninth Schedule

In this case the applicant had applied for an order of mandamus against the Kadi of Daerah Pendang, Kedah and the Chief Registrar of Marriage, Divorce and Revocation, Kedah to order them to register a marriage between the applicant and one Normala bte Jusoh solemnized in Patani, Thailand according to Muslim rites on 15 January 1986. The applicant had applied for registration of the marriage and the Kadi had fixed a date for hearing in order to get further details of the marriage. The applicant was advised, however, that it was not necessary to have a hearing as all that was necessary was for him to attend before the Kadi to register the marriage. The applicant with-

A drew the earlier application but subsequently re-applied to have his marriage registered. The case was pending in the Kadi's court. In the meantime, Normala bte Jusoh had obtained a 'taklik' divorce from the Kadi's office in Senggara, Thailand, and then subsequently successfully applied to have the divorce confirmed and registered in the Kadi's court, Pendang. Later she married her former fiancée, Osman bin Omar, in Thailand and Osman bin Omar applied to have the marriage registered. B This application was also pending. Leave to apply for an order for mandamus was granted to the applicant and the application was heard in the High Court.

Held, dismissing the application:

C (1) The application for registration of the marriage had not been disposed of in the Kadi's court and even if a decision had been made against the applicant, the applicant had a remedy to appeal to the Syariah Court of Appeal.

(2) It cannot be truly ascertained in this case that both the respondents have not performed their duty as 'an imperative ministerial character involving no judgment or discretion on their part'.

D (3) This case does not fall within the jurisdiction of the High Court to issue an order of mandamus because the parties are Muslims and it involves the personal law of Muslims both under the Kedah State Constitution as well as the Federal Constitution.

E (4) Even if the court were to issue an order of mandamus to compel the respondents to register the marriage, it would only be a case of an academic and judicial exercise because there is no more foreign marriage between the applicant and Normala as such to be registered.

[*Editorial Note:* The applicant has appealed to the Supreme Court vide Civil Appeal No 420 of 1987.]

F **Cases referred to**

- 1 *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175 (folld)
- 2 *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180 (refd)
- 3 *Ng Bee v Chairman, Town Council, Kuala Pilah* [1975] 1 MLJ 2733 (refd)

G **Legislation referred to**

- Federal Constitution Ninth Schedule
Islamic Family Law Enactment 1984 (Kedah) ss 20(4), 23, 25, 108
Kedah State Constitution art 33(B)(1)
Rules of the High Court 1980 O 83
H Specific Relief Act 1950 ss 44, 45

Ahmad Farid for the applicant.

Abdul Malik bin Haji Ishak (State Legal Adviser, Kedah) for the respondents.

Cur Adv Vult

I **Mohamed Ariff J:** This is an appeal against the decision of the High Court, Alor Setar dismissing an application by one Mansor bin Mat Tahir, the applicant, for an order of mandamus under O 53 of the Rules of the High Court 1980 against the Kadi of Daerah Pendang, Kedah as the first respondent and the Chief Registrar of Marriage,